MOBIL OIL (M) SDN. BHD.

v.

OFFICIAL ADMINISTRATOR

HIGH COURT MALAYA, IPOH
PEH SWEE CHIN J
[CIVIL SUIT NO. 21-125-86]
16 NOVEMBER 1987

CONSTITUTIONAL LAW: *Immunity of Sovereign from suit - Does it extend to the administrator of the estate of a dead sovereign - Article 181 of Federal Constitution and Article XI, Part II of the Laws of the Constitution of Perak - The effect of unconditional appearance on immunity - Article 32A of the Federal Constitution - Article XII and X Part II of the Laws of the Constitution of Perak.*

After the death of the Ruler of Perak, legal proceedings were instituted against the estate of the late Ruler for debts incurred by a mining firm of which the late Sovereign was the sole proprietor. The administrator of the estate of the late sovereign was cited as defendant. The said administrator entered unconditional appearance and filed a defence which among other things stated that the estate was not liable as "the deceased was at all material times the Sovereign of the State of Perak and therefore not liable to any proceeding whatever in any Court." The Court by consent of both parties made an order that a preliminary issue as to whether the said defence disclosed a good defence in law, be tried first before the trial of other issues in the action.

Held:

[1] Clause 2 of Article 181 of the Federal Constitution was a complete code in itself in regard to the absolute immunity available to all Rulers from all legal proceedings, both criminal and civil. The only qualification being that the immunity does not extend to them in their official capacity.

[2] The relevant provisions in the Laws of Constitution of Perak were, Clause (a) of Article XI, Article XII and Article X of part II. In terms of these provisions as well, no legal proceedings of whatever nature, criminal or civil were maintainable against the late Sovereign.

[3] The extremely personal nature of the prerogative of immunity to the person of the Sovereign can never be transmitted to the administrator of his estate. Consequently the question whether entry of unconditional appearance by the defendant amounts to a submission to the jurisdiction of the Court becomes immaterial. Assuming however the later sovereign was alive and had entered unconditional appearance coupled with a defence by royal prerogative of immunity, the circumstances would not amount to a submission to jurisdiction of the Court. In this latter example even in the absence of a defence of this prerogative of immunity, it would still not amount to a submission to jurisdiction, but only one of the factors to be considered, as to whether there is in fact such consent to be sued.

[4] The defendant was not liable for the sum as claimed as the later Ruler of Perak was not liable to any legal proceeding whatsoever in his personal capacity.

Cases referred to:

Mighell v. The Sultan of Johore [1893] 1 QB 149
Stephen Kalong Ningkan v. Tun Abang Hj Openg & Ors. (No.2) [1967] 1 MLJ

Legislation referred to:
Federal Constitution, arts. 32 (a), 181, (2)
Constitution of the State of Perak, arts. X of Part II, XI of Part II, XI(a), XII
Probate and Administration Act 1959, ss. 67, 68

Other sources referred to:
Halsbury's Laws of England, 4th Edn. Vol. 8, para. 896
An Introduction to the Constitution of Malaysia, Tun Mohd Suffian

For the plaintiff - S.N. Leow; M/s. S.N. Leow & Co.
For the defendant - Yeow Khoon Kwong; M/s. Yeow & Co.

JUDGMENT

Peh Swee Chin J:

This case raises certain points of some constitutional importance in connection with legal proceedings herein against the estate of the late Rulers of Perak, such proceedings were of course commenced after the demise of the said Ruler whom I shall hereinafter refer to as the late Sovereign.

After his demise, a grant of letters of administration to his estate was issued to Official Administrator Malaysia as the administrator. The plaintiff an oil company, claims a sum of RM68,132.86 being price of diesel oil supplied to a mining firm of which the late Sovereign was the sole proprietor, citing as the defendant, the Official Administrator, Malaysia as administrator for the estate of the late Sovereign.

The said administrator has entered an unconditional appearance to this suit and filed a defence, which, by its para. 5, states:

> Further and in the alternative, if which is denied the deceased was indebted to the plaintiff in the sum of RM68,132.86 as alleged, the deceased's estate is not liable for the same as the deceased was at all material times the Sovereign of the State of Perak and therefore not liable to any proceedings whatever in any Court.

On a subsequent application from the plaintiff, the Court, by consent of both parties, made an order that a preliminary issue as to whether the said para. 5 of the defence disclosed a good defence in law, be tried first before the trial of other issues in the action. The application was well-advised.

At the hearing of the said preliminary issue, learned Counsel for the administrator or defendant submitted to the effect as follows. The present action would never have been commenced had the late Sovereign been alive. The debt was incurred by the late Sovereign and this immunity (from legal process) that was available to the late Sovereign continued after his demise. The said administrator would be clothed with the same immunity as the present action was in fact against the late Sovereign.

He cited Article 181 of the Federal Constitution and Article XI of part II of the Laws of the Constitution of Perak, and para. 896 of Vol. 8 of the *Halsbury's Laws of England,* 4th Edn.

Learned Counsel for the said administrator also submitted that the entry of the an unconditional appearance would not amount to a submission to the jurisdiction of the Court because the said administrator could not waive the immunity which attached to the late Sovereign personally. Counsel cited the celebrated case of *Mighell v. The Sultan of Johore* [1893] 1 QB 149. It was submitted that when the Court was asked to exercise jurisdiction, the late Sovereign had already passed away.

On the other hand, learned Counsel for the plaintiff submitted that there should have been a conditional appearance followed by an application to set aside (service of writ). He also cited ss. 67 and 68 of the Probate and Administration Act 1959 referring to assets of a deceased person being available for payment of debts. It was further submitted that, by applying for a grant of letters of administration, the administrator had already submitted to jurisdiction of the Court.

It would be obvious that the sovereignity, prerogatives, and powers of the late Sovereign would fall for consideration.

To revert to the supreme law of the land, the Federal Constitution, the last article, i.e. Article 181 deals with and expressly preserves the sovereignty of Rulers among whom was, of course, the late Sovereign. It states:

> (1) Subject to the provisions of this Constitution, the sovereignity, prerogatives, powers and jurisdiction of the Rules and the prerogatives, powers and jurisdiction of the Ruling Chiefs of Negeri Sembilan within their respective territories as hitherto had and enjoyed shall remain unaffected.
>
> (2) No proceedings whatsoever shall be brought in any Court against the Ruler of a State in his personal capacity.

Clause 2 of Article 181, on the question of immunity canvassed before the Court, appears almost to be a complete code in itself in regard to the absolute immunity available to all Rulers from all legal proceedings, both criminal and civil, except for one qualification, i.e. that such proceedings from which the Rulers enjoy complete immunity must be proceedings brought against them in their personal capacity in contradistinction to proceedings against them in their official capacity. An example of liability to be sued in such official capacity would be the case of the dismissed Chief Minister against the Governor of Sabah State in *Stephen Kalong Ningkan v. Tan Abang Hj Openg & Ors.*, (No.2) [1967] 1 MLJ. It was there argued for the defence that the power to proclaim a state of emergency vested in the Yang Di Pertuan Agong and by virtue of Article 32(a) of the Federal Constitution (conferring similar immunity on His Majesty), the proclamation could not be challenged. Pike, CJ held that the Article 32(a) (which is without the words "in his personal capacity"), did not protect the Federal Government from acts done in the name of Yang Di Pertuan Agong.

If I may venture to say so, Pike CJ was undoubtedly right; were it otherwise, to carry further that aforesaid unsuccessful argument to its logical conclusion, Government of Malaysia could never be sued in Court e.g. for any breach of contract or tort committed by Federal Government, for His Majesty is the Supreme Head and the constitutional monarch of the Government of Malaysia. It is merely a matter of nomenclature that in legal proceedings, the name of Government of Malaysia is cited instead of the name or title of Yang Di Pertuan Agong. It is interesting to observe that in United Kingdom's Court of Appeal (Criminal division), I believe it is still *John Doe v. Regina or John Doe* against the Queen, a legacy from the past. Were it otherwise, more importantly, Government Proceedings Act 1956 would be rendered useless.

To revert to more urgent matter in hand, I will now refer to the relevant provisions in the Laws of Constitution of Perak which should be Clause (a) of Article XI and Article XII, but I will set out in full not only the two Articles just mentioned, but also Article X of Part II of the Laws of the Constitution of Perak:

X. In amplification and not in derogation of the Royal prerogatives hitherto possessed or exercised by the Sovereign the following Royal Prerogatives among others are vested in the Sovereign:

(a) The Fountain of Honour,

(b) The Fountain of Justice,

(c) The Fountain of Mercy,

(d) The Head of the Religion of the State,

(e) The Protector of Malay Custom,

(f) The Ultimate Owner of the Soil.

XI. In the concept of sovereignty the following are inherent:

(a) The Sovereign can do no wrong.

(b) The sovereign never dies.

XII. Sanctity shall attach to the person of the Sovereign and such of His residences as shall be prescribed by the Dewan Negara.

I first deal with Article XII. It must have been delivered form the principle in England that nobody ought to have any coercive power over the person of the King, so that the King is immune from all legal proceedings either criminal or civil. In my judgment the word "sanctity" in the said Article XII means inviolability since it is used in association with the words "to the person". The said Article XII has, in my judgment, the same effect as the aforesaid principle.

Yet another source of such immunity is to be found in Clause (a) of the said Article XI which practically appears to be an enactment of the maxim that "the King can do no wrong" or its Latin version, "*rex non potest peccare*," and thus no remedy lies against the King in person either in civil or criminal nature, please see Vol. 8 of the *Halsbury's Laws of England*, mentioned above.

Thus both from the Federal Constitution and the Laws of the Constitution of Perak, no legal proceedings of whatever nature, criminal or civil could have been maintainable against the late Sovereign, and it goes without saying the same position undoubtedly still obtains today in Perak.

In my judgment, the extremely personal nature of the prerogative of immunity from all legal process to the person of the late Sovereign cannot conceivably be ever transmitted to the administrator of his estate who can never aspire to have such sancity to the person. Not having such prerogative or immunity, the administrator cannot waive it for he has nothing to waive. Consequently the entry of an unconditional appearance, if it really has the effect of amounting to a submission to the jurisdiction of the Court would become completely immaterial and ineffective, neither would it have any of the effect learned Counsel contended it had.

Before departing from this case, out of deference to Counsel's arguments, though not necessary for the determination of the preliminary issue, I must say a few words about the question as to the effect, if any, of unconditional appearance coupled with a defence of the royal prerogative of immunity as pleaded in the defence filed, assuming that the late Sovereign had been alive and had himself entered such appearance and entered such defence. I do not think that such circumstances would amount to a submission to jurisdiction of the Court.

In so much as an entry of unconditional appearance giving rise to an inference of submission to jurisdiction as decided by the Courts in the case of ordinary defendants resident out of jurisdiction, I do not think an analogy in regard to such an inference can, with any degree of finality, be drawn between a sovereign ruler and such ordinary defendants resident out of jurisdiction. Such an entry of appearance, coupled with the raising of the defence, could not really amount to a waiver of such immunity or to a consent to be sued. Our former Lord President, Tun Mohd Suffian, in his book, "*An Introduction to the Constitution of Malaysia*", speaking about the right of a sovereign ruler to submit to jurisdiction wrote about such submission being "either by himself suing or consenting to be sued".

Further, Kay LJ in the case of *Mighell v. The Sultan of Johore, supra*, appears to explain the onus of proving submission to jurisdiction as "... or unless being sued, he **actively elects** to waive his privilege ..." (Emphasis is mine).

Further, a defendant resident out of jurisdiction becomes subject to the jurisdiction *ipso facto* on his taking up residence within the jurisdiction, but the fact that the defendant in *Mighell* case was not subject to such automatic imposition of similar liability would go some way in showing that the royal prerogative of such immunity is made of much sterner stuff than that look alike immunity of ordinary defendants arising out of residence out of jurisdiction. Would not this be another reason that the aforesaid analogy should not be drawn in haste?

Kay LJ in the same case also expressed the view that a sovereign ruler need not go to Court and assert his right of immunity because the Court would be bound to take notice of the fact it had no jurisdiction over the sovereign ruler. The inference of submission to jurisdiction from an entry of appearance (which is after all, in truth, a notification of one's intention to resist the claim), will be fairly negatived by the judicial notice of want of jurisdiction referred to.

In my view, an entry of unconditional appearance even in the absence of a defence filed pleading the defence of this prerogative of immunity, would still not amount conclusively and simpliciter, to a submission to jurisdiction, but it is only one of the factors to be considered, as to whether there is in fact such consent to be sued.

The Court therefore decides the said preliminary issue in favour of the defendant by declaring that the defendant is not liable for the sum as claimed as the late Ruler of Perak was not liable to any legal proceedings whatsoever in his personal capacity. Costs will be costs in the cause.

Also found at [1988] 2 CLJ 230